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DATE:

MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Bernard T. Carreau
Deputy Assistant Secretary
for Group II, Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Canned Pineapple Fruit from Thailand

Summary

We have analyzed the case and rebuttal briefs of interested parties for these final results of the antidumping duty review covering canned pineapple fruit (CPF) from Thailand. We received comments from the petitioners[1] and certain respondents. We recommend that you approve the positions we have developed in the Department Position sections of this memorandum.

Background

On August 7, 2002, the Department of Commerce (the Department) published the preliminary results of the sixth antidumping duty administrative review of CPF from Thailand. The period of review (POR) is July 1, 2000, through June 30, 2001. The respondents in this case are: Vita Food Factory (1989) Co., Ltd. (Vita), Kuiburi Fruit Canning Co. Ltd. (Kuiburi), Malee Sampran Public Co., Ltd. (Malee), Siam Food Products Public Co. Ltd. (SFP), The Thai Pineapple Public Co., Ltd. (TIPCO), Thai Pineapple Canning Industry (TPC), Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd. (collectively, Dole), and Siam Fruit Canning (1988) Co., Ltd. (SIFCO). On September 17, 2001, in response to the Department's questionnaire, Prachuab Fruit Canning Company (Praft) stated that it made no shipments of subject merchandise to the United States during the POR. We gave interested parties an opportunity to comment on the preliminary results. On September 6, 2002, we received case briefs from Dole, TPC, and the petitioners. On September 13, 2002, we received rebuttal briefs from the petitioners, Dole, and Malee. TIPCO also submitted a rebuttal brief on September 25,

[1] The petitioners in this case are Maui Pineapple Company and the International Longshoremen's and Warehousemen's Union.

2002, but it was rejected by the Department as an untimely submission.[2]

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[2] *See* Letter to Anurat Tiamtan from Gary Taverman, Director, Office 5, Import Administration (September 30, 2002).

Discussion of Issues

I. ISSUES SPECIFIC TO DOLE

Comment 1: Royalty Payments

The petitioners argue that Dole's comparison market prices should not be adjusted for royalties. Due to the proprietary nature of the information related to this issue, this comment is addressed in greater detail in the Analysis Memorandum for Dole Food Company, Dole Packaged Foods and Dole Thailand (Dole Analysis Memorandum), dated concurrently with this notice, on file in the Central Records Unit (CRU).

Department Position:

We agree with Dole that its comparison market prices should be adjusted for royalty expenses and therefore have continued to allow this adjustment as we did in the preliminary results. For a full discussion of the Department's position, see the Dole Analysis Memorandum.

Comment 2: Indirect Selling Expenses

The petitioners contend that when Dole reported its indirect selling expense ratios for Canada and the United States, it did so according to the volume of products shipped,[3] even though the Department's standard practice is to allocate selling expenses according to value. The petitioners argue that two separate ratios for Dole's North American market are not necessary, especially because Castle & Cook Worldwide (CCWW), the affiliated Hong Kong-based trading company that distributes Dole Thailand's CPF worldwide, would not likely have different expenses for the Canadian and U.S. markets. Instead, petitioners state a single ratio based on the total expenses and total sales reported for the two markets should be applied to the gross price net of discounts.[4]

Dole explains that it reported its trading company's expenses as found in that company's accounting records, which it says are in accordance with generally accepted accounting principles in both the United States and Hong Kong. Dole cites section 773(f)(1)(A) of the Act[5] as support for the Department's acceptance of the two ratios based on sales volume. It also points out that

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[3] *See* Dole Response to Supplemental Questionnaire, Sixth Administrative Review,*(Dole SQR)* at Exhibit SB-*7*.

[4] *See* the Petitioners' September 9, 2002, Case Brief on Dole (*Petitioners' Dole Case Brief*) at 6-7.

[5] Section 773(f)(1)(A) of the Act says: "Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise."

the trading company allocates its expenses into market-specific accounts based on sales volume.[6]

Furthermore, in support of its trading company's practice of allocating costs based on volume, Dole states that the "personnel costs involved in handling shipment documents and invoices {are} more directly related to the sales volume than sales value."[7] Dole contends that the Department took the correct action by using the two ratios for the indirect selling expenses as recorded in its trading company's books and that the petitioners did not offer enough support to justify creating a single ratio based on relative sales value.

Department Position:

We agree with Dole that we should continue to calculate indirect selling expenses incurred by CCWW using Dole's market-specific volume-based allocation ratios. In Dole's sales datasets these expenses are reported as indirect selling expense incurred outside Canada (DINDIRST) and indirect selling expenses incurred outside the United States (DINDIRSU). The methodology to calculate the ratios for these indirect selling expenses in the instant review has been verified and accepted in previous reviews. It is based on the normal allocation that CCWW records in its books and records which are kept in conformity with GAAP. The petitioners have provided no evidence that CCWW's allocations of indirect selling expenses are distortive. In fact, as Dole has indicated, the petitioners' suggested recalculation continues to rely on CCWW's volume-based allocations,[8] *i.e.* the petitioner's suggested recalculation differs from that of Dole only because it combines the volume-based expense allocations for Canada and the United States and divides the total expense over total sales for the two countries. Because there is no evidence on the record demonstrating the need to deviate from our previous practice regarding allocation of CCWW's indirect selling expenses, we have used Dole's calculation of DINDIRST and INDIRSU for these final results.

Comment 3: Surrogate Canadian-dollar Interest Rate

The petitioners argue that the average prime lending rate was not an appropriate surrogate rate for Dole to use in its credit calculation, even though Dole did not have any short-term borrowings in the Canadian market. Rather, the petitioners contend that Dole's creditworthiness is demonstrated by the rate it receives for U.S.-dollar borrowings. The petitioners suggest that the Department recalculate credit on Dole's Canadian sales by substituting a Canadian-dollar interest rate commensurate with Dole's actual U.S.-dollar borrowings. They note that the Department

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[6] *See* Dole's September 16, 2002, Case Brief (*Dole Case Brief*) at 10.

[7] *See id.* at 11.

[8] *See id. at 12. See also Petitioners' Dole Case Brief* at 7 and *Dole SQR* at 21and Exhibit SB-7.

rejected this argument in the fifth administrative review of CPF from Thailand,[9] but contend that the Department should not stop at whether the rate used is published – the Department should scrutinize whether or not the rate is appropriate. To that end, the petitioners contend that the rate Dole used represents cherry-picking because Dole Group's creditworthiness is such that there may be a difference between the prime rate and Dole's actual rate, and that the prime rate Dole chose to use appears to be "arbitrary."[10]

Dole says that the Department should stand by its standard practice; Dole is only following Department instructions[11] by using published short-term credit rates in Canada since it did not have any borrowings in Canadian dollars. Besides noting the Department's previous rejection of petitioners' argument, Dole points out that this policy has been formally adopted by the Department in a Policy Bulletin.[12] Further, Dole states that the surrogate rate has been on the record since Dole filed its response and the petitioners have not provided an alternative to the published information Dole used.

Regarding the cherry-picking assertion, Dole points out that the rate it used was the appropriate short-term lending rate, while the other rates the petitioners cited in their arguments were deposit rates. The Department should not, Dole contends, disregard a published short-term rate in lieu of unfounded speculation that this rate might not reflect the borrowing cost that Dole would have incurred in Canada, had it borrowed in Canadian dollars.[13]

Department Position:

We agree with Dole. Because Dole had no short-term borrowing in Canadian dollars, Dole provided a POR-average, short-term prime lending rate from *The Economist*, consistent with the Department's instructions in the questionnaire. Where a respondent has no short-term borrowing in the currency of the transaction, it is the Department's policy to use publicly available information to establish a short-term interest rate applicable to the currency of the transaction. *See Import Administration Policy Bulletin 98.2* (February 23, 1998). *See also Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Mexico*, 67 FR 55800 (August 30, 2002), and the accompanying Issues and Decision Memorandum at Comment 3.

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[9] *See* Issues and Decision Memorandum accompanying *Notice of Final Results of the Antidumping Duty Administrative Review and Rescission of Administrative Review in Part: Canned Pineapple Fruit from Thailand* 67 FR 52,744 (October 17, 2001) at Comment 3.

[10] *See Petitioners' Dole Case Brief* at 7-8.

[11] The Department's questionnaire states: "If you did not borrow short-term during the period of review, use a published commercial short-term lending rate." *See Dole Section B Response, Sixth Administrative Review,* at B-32.

[12] *See* Import Administration Policy Bulletin 98.2 (February 23, 1998).

[13] *See Dole Case Brief* at 12-16.

Comment 4: Clerical Error Allegation

Dole argues that the Department made a clerical error by treating certain discounts as negative values when Dole intended them to be positive values. Dole states that the Department's programming seeks to arrive at a net price by subtotaling the discounts and rebates first and then subtracting the subtotal from the reported gross unit sales price. Because the programming assumes the discounts have been reported as negative values, according to Dole, the Department's program subtracts the discounts Dole reported when instead they should be added to calculate the proper subtotal.[14]

Department Position:

We agree that this was a clerical error, and it has been corrected in the final results. *See* the Dole Analysis Memorandum.

II. ISSUES SPECIFIC TO MALEE

Comment 5: Indirect Selling Expense Ratio

The petitioners argue that Malee has under-reported the U.S. indirect selling expenses incurred in the sale of subject merchandise. Specifically, the petitioners argue that, given the sources of revenue reported by Malee's subsidiary, Icon Foods, LLC (Icon), Malee's explanations for allocating a percentage of the indirect selling expenses incurred by Icon to products other than CPF should be dismissed.[15] The petitioners assert that it is not plausible that such a large percentage of Icon's indirect selling expenses should be allocated to non-CPF related activities given the sources of Icon's income.[16] They also assert that Malee's sample correspondence does not provide sufficient evidence to support Icon's allocation of indirect selling expenses to non-CPF products.[17] The petitioners propose that Icon's indirect selling expenses be allocated exclusively to CPF.

Malee responds that the petitioners' proposal is baseless and that it has allocated Icon's indirect selling expenses correctly between CPF and non-CPF products. Citing to its supplemental questionnaire response, Malee argues that the petitioners' reason for their claim "– that Icon

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[14] *See* Dole's September 6, 2002, Case Brief on Clerical Error Allegation.

[15] *See* Petitioners' Case Brief on Malee (September 6, 2002) (*Petitioners' Malee Brief*) at 1-2.

[16] *See* Analysis Memorandum for Malee Sampran Factory Public Company, Ltd. (Malee): Final Results of Sixth Administrative Review of Canned Pineapple Fruit from Thailand (December 5, 2002) (Malee Calculation Memorandum) for further discussion which cannot be publically summarized.

[17] *See* Response of Malee Sampran Public Company, Ltd. (Malee) to the Department's Supplemental Questionnaire (*SQR*) at Volume I at 4 and Exhibit 31.

Foods' only source of revenue is sales of CPF – would not preclude the Department from allocating such expenses between CPF and other products."[18] Malee asserts that whatever Icon's source of revenue is, the Malee affiliate also plays an active role in dealing with U.S. customers to develop marketing opportunities and providing marketing assistance for non-subject merchandise.[19] It maintains that the fact that Icon Foods is not invoicing non-CPF products, and thereby not earning direct revenue from non-CPF sales, does not detract from the fact that it incurs expenses related to the sale of non-CPF products.[20] Further, Malee claims that Icon Foods' involvements in CPF sales was minimal.

Malee cited to the *Notice of Final Results of Antidumping Duty Administrative Reviews: Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 66 FR 3540 (January 16, 2001) (*Korean Flat Products*) in which the Department stated that {indirect selling expenses} "are expenses that neither result from, nor bear a direct relationship to, a particular sale."[21] Again citing *Korean Flat Products*, Malee asserts that the Department has accepted methodologies such as the one used by Malee when the record "contains no evidence that the methodology used by the Respondent was distortive or otherwise inappropriate."[22] Malee argues that there is no evidence of distortion or inappropriateness of its methodology, which has already been accepted as reasonable in the fifth administrative review, in which Malee's reported U.S. indirect selling expenses were used to calculate both the preliminary and final results.[23] Malee notes that in both the fifth and sixth administrative reviews the Department requested supplemental information on U.S. indirect selling expenses, but upon receipt of this information, asked for no further evidence. Malee observes that prior to the submission of their case brief, the petitioners did not comment on the reported U.S. indirect selling expense allocation, despite the fact that it was presented in October 2001. Therefore, argues Malee, given this and its ample description and evidence of Icon Foods' CPF and non-CPF activities, the Department should continue to accept Malee's allocation methodology for the final results.

Department Position:

We agree with the petitioners that we should adjust Icon's indirect selling expense ratio to

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[18] *See* Malee's September 13, 2002, Case Brief of Malee Sampran Public Co. Ltd. (*Malee's Rebuttal Brief*) at 2-3.

[19] *See id.* at 3 and footnote 7.

[20] *See id.* at 3. *See also* Malee Calculation Memorandum for further discussion which cannot be publically summarized.

[21] *See Malee's Rebuttal Brief* at 6 and footnote 1. *See also Korean Flat Products* in the Department's accompanying Issues and Decision Memorandum at Comment 1.

[22] *See id. See also Korean Flat Products* in the Department's accompanying Issues and Decision Memorandum at Comment 4.

[23] See *Malee's Rebuttal Brief* at 3 and 6.

allocate all of Icon's indirect selling expenses to CPF. Icon's profit and loss statement for the POR indicates that the indirect selling expenses under consideration are part of its operational expenses and are used to adjust Icon's income, which, as Malee acknowledges, comes exclusively from CPF sales.[24] We have no evidence that Icon anticipates revenues accruing to its own revenue accounts in any form as a result of these activities. While such revenue could come in a form other than sales revenue, payments or commissions for services rendered for example, Malee provided us with no evidence that there was any Icon income related to non-CPF activities. Accordingly, we conclude that Icon itself attributes all of its expenses to the sales of CPF. Therefore, the Department allocated 100 percent of indirect selling expenses incurred by Icon to CPF.

Malee has argued that the fact that Icon's revenue only comes from CPF sales does not detract from the fact that certain Icon activities are devoted to the sale of other products and therefore should be the basis for the allocation of a portion of Icon's indirect selling expenses. We do not dispute Malee's contention that under certain circumstances the Department may allocate indirect selling expenses between sales of subject and non-subject merchandise. However, for selling expenses of a given entity to be allocated to sales of particular products, the entity must actually show that it anticipated revenues related to those expenses. We note that in the *Korean Flat Products* example cited in support of Icon's allocation of indirect selling expenses between subject and non-subject merchandise, no evidence was present to indicate that the sales of the *Korean Flat Products* resellers were limited to only one of the several products to which indirect selling expenses were allocated.[25] In the case of Icon, we do not have any information about Icon revenue other than that which was earned from the sale of CPF. Icon personnel may assist in the sales of other Malee products, but the revenue from sales of the other products appears to go directly to Malee Sampran income. Therefore, unless there was evidence that Icon anticipated or received some form of separate payment for its support of non-CPF sales, it is indirect selling expenses incurred by Malee Sampran, and not those incurred by its U.S. affiliate, that should be allocated to these non-CPF sales.

Malee is correct in noting that the Department accepted Icon's partial allocation of its indirect selling expenses to products other than CPF in the fifth administrative review. However, Icon's indirect selling expenses were not raised as an issue in that review and the Department's acceptance of Icon's allocations as reported in that review should not prejudice our decision in the instant review in which the issue was specifically raised by the petitioners and rebutted by Malee.

Comment 6: Malee's Net Realizable Value (NRV) Calculation

The petitioners argue that the Department should revert to "historical cost data" used in previous

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[24] *See* SQR at 40-42 and Exhibit 10.

[25] *See Korean Flat Products* in the Department's accompanying Issues and Decision Memorandum at Comments 1and 4.

reviews and discard Malee's new NRV calculation. First, the petitioners state, Malee's new NRV calculation was based on data from the partial period April 1992 to December 1994. The petitioners assert that the section D questionnaire requires cost data for the five years of 1990 to 1994. They argue that Malee's use of partial-period data contradicts what the Department intended in *Canned Pineapple Fruit from Thailand: Final Determination of Sales at Less Than Fair Value*, 60 FR 107 at 29,553, 29,560 (June 5, 1995) (*Final Determination*), in that the data do not represent "several" years prior to the antidumping proceeding.[26]

Next, the petitioners argue that because Malee's NRV data have not been subject to verification, Malee's calculation should be discarded. The petitioners declare that the Department does not have reason enough to discard historical data that have been subject to verification in favor of partial-period data that haven't been subject to such scrutiny. Further, the petitioners accuse Malee of continuing attempts at shifting costs away from subject merchandise and say that this gives even more reason for the Department to use historical, verified information.[27]

Last, the petitioners assert that there is no need for the Department to consider a change in Malee's historical cost allocation. The petitioners state that the only reason this issue arose is that Malee attempted to change its allocation. Also, the petitioners observe that the Department has not changed the NRV ratios of other responding companies throughout many administrative review periods.[28]

Malee argues that the alternative fruit cost allocation methodology adopted by the Department properly reflects the historical NRV ratio between solid and juice pineapple products. The respondent rebuts the petitioners' arguments by stating that the petitioners' arguments are unwarranted. First, Malee explains that it developed its new fruit cost methodology when it began a new cost accounting system and that the old ratio of allocating fruit costs is no longer a reasonable method.[29]

Next, Malee explains that it submitted "partial-period data" because it does not possess the relevant accounting records for the periods before April 1992. The company highlights that these data would be from periods ten or more years ago. Malee further explains that the process of separating cost data is very complicated. The respondent states, "{t}o expect a company . . . to retain revenue and cost data at that level of detail for more than ten years would simply be over burdensome."[30]

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[26] *See Petitioners' Malee Brief* at 5.

[27] *See id.*

[28] *See id.* at 6.

[29] *See Malee Rebuttal Brief* at 8.

[30] *See id.* at 9.

Malee argues that the petitioners' citation of Department precedent in the CPF investigation actually shows that the use of several years of data would be ideal, but not necessary. Moreover, Malee argues, it should not be penalized through the use of an adverse methodology no longer in use by Malee.[31]

Next, Malee states that the Department used data from a shorter period of time and home-market prices and costs from the period of investigation in its final determination for Softwood Lumber from Canada.[32] This Department precedent, argues Malee, shows that the Department can use data that are not necessarily ideal. Therefore, concludes the respondent, the Department should not discard Malee's submitted costs because it was not able to report ten-year-old data.[33]

Malee argues in its rebuttal brief that the data available for the partial period were "reasonably uniform" and therefore suggests that there is no reason to believe that the shorter period "contains outliers or, otherwise, does not reflect the relative amounts of revenue generated by solid and juice products by Malee prior to the CPF case."[34] Malee observes that the annual NRV ratios in 1992, 1993, and 1994 are all within plus or minus five percent of the average. The company argues that this shows that the cost information is a good sample to use for Malee's fruit cost allocation.[35]

Last, Malee declares that the fact that its cost allocation information has not been verified is no reason for the Department to discard such data from its cost allocation process. The respondent states that the data reported by Malee were available for verification at the Department's request, and just because information was not verified does not make it unreliable information.[36]

Department Position:

We agree with the petitioner and for the final results, we have used the fruit cost allocation methodology historically used by Malee in its normal books and records and relied upon by the Department as being reasonable in past antidumping proceedings. While it is true that Malee changed its internal cost allocation method for pineapple fruit costs in the current review, we do not consider it appropriate to rely on this new cost allocation method for the final results. The Department normally prefers that respondents rely on their normal cost accounting records as the

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[31] *See id.* at 9-10.

[32] *See* Issues and Decision Memorandum accompanying *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15,539 (April 2, 2002) (*Lumber Decision Memorandum*) at Comment 4.

[33] *See Malee's Rebuttal Breif* at 10.

[34] *See id.* at 11.

[35] *See id.*

[36] *See id.*

basis for allocating the costs for our antidumping analysis, provided that the respondent's normal cost allocation is done in a way that reasonably reflects the actual costs.

In past segments of this proceeding, we relied on Malee's normal fruit allocation method because its normal method reasonably took into account qualitative differences of pineapple parts used for solid and juice products and it reasonably allocated production costs to the different products produced. Therefore, in previous reviews, the Department relied on the fruit cost allocation method used in Malee's normal books and records and thus did not require Malee to recalculate its reported costs using the Department's NRV methodology.

In the fifth administrative review, Malee reported that it had changed its methodology for allocating fruit costs among its different products, which include both solid and juice items. The Department requested information concerning Malee's new fruit cost allocation methodology. However, Malee failed to provide the Department with sufficient evidence to demonstrate that the revised fruit cost allocation methodology, although used in Malee's normal records for part of that review period, reasonably reflected costs associated with CPF versus those associated with juice products.[37]

In the instant review, Malee presented and documented two alternative methodologies for allocating fruit costs among its joint products.[38] As explained in its supplemental response, as part of its normal accounting practices, Malee now allocates fruit costs based on the relative production volumes of each of its individual products to which are applied revenue-based "factor weights" derived from the "expected prices" of each product.[39] Malee, in effect, calculates product-specific NRV ratios for each of its products, whether juice or solid, and on that basis, makes product-specific fruit cost allocations. Malee stated in its response that "the accounting department included these prices in its derivation of factor weights to account for the qualitative differences in the parts of the pineapple that are reflected in the prices."[40] The overall solid/juice fruit cost allocation ratio reported by Malee in its responses represents the result of product-specific allocations of all of its various solid products compared to the allocation for Malee's one pineapple juice product.[41] The ratio therefore reflects the outcome of Malee's product-specific allocations rather than the basis of these allocations.

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[37] *See* Analysis Memorandum for Malee Sampran Factory Public Company, Ltd. (Malee) accompanying *Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit from Thailand,* 66 FR 18,596 (April 10, 2001), at 2-3 (*2001 Preliminary Results*).

[38] *See SQR* at Volume II, 2-12 and Exhibits 33-41.

[39] *See id*. at 4-7 for discussion of the relative volume factor (% Yield) and 7-9 for discussion of the revenue factor ("factor weight" derived from "expected prices") and Exhibits 33-34.

[40] *See id*. at 8.

[41] *See id*. at 10 and Exhibits 33-35.

While Malee's new fruit cost allocation methodology takes the qualitative differences between solid and juice product inputs into account, we find that we cannot apply this methodology in our antidumping cost analysis because the "expected prices" used in the allocation formula are projected rather than actual prices derived from actual sales[42]. Since there is no record evidence to support a conclusion that Malee's cost allocation method previously used by the company and relied upon by the Department unreasonably allocates fruit costs to the different products produced, for the final results, the Department used Malee's historic cost allocation method used in previous reviews. This method reflects the cost allocation historically used in Malee's normal accounting records, it takes into account the qualitative difference between solid and juice product inputs, and it reasonably allocates costs to the different products produced.

Comment 7: General and Administrative Expenses

The petitioners argue that Malee incorrectly deducted certain amounts from its general and administrative (G&A) expenses on the grounds that these expenses were neither related to the company's general operations nor to the production of CPF.[43] Citing the questionnaire's instructions for reporting G&A expenses, the petitioners point out that the Department defines G&A expenses as period expenses indirectly relating to general operations. The Department does not state that they had to relate to the production of subject merchandise. This makes the exclusion of certain expenses on the grounds that they were not related to the company's general operations nor to the production of CPF, irrelevant. Therefore, these exclusions are invalid, according to the petitioners.

Further, the petitioners argue that Malee applied too narrow a definition to the word "general" when following the Department's instructions. The petitioners cite to certain excluded expenses, related to non-subject merchandise, stating that it is ludicrous to claim that these expenses are not related to the general operations of the company. These expenses related to the production and sale of non-subject products are just additional business expenses and are as related to Malee's general operations as processing pineapple is. Furthermore, claim the petitioners, Malee has drawn a distinction where none exists. Since Malee describes itself as a "{m}anufacturer and exporter of processed fruit and beverage products,"[44] the petitioners maintain that Malee's general operations should be inclusive of all costs associated with production and selling of all of Malee's products. Lastly, the petitioners question why these expenses were classified under selling and administrative expenses by Malee's auditors, if they were unrelated to the general operations of Malee.

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[42] *See Petitioners' Malee Brief at Exhibit 2*. Petitioners provide excerpts from Malee's POR5 *Supplemental Response* (Feb. 1, 2001) which in turn provides at Exhibit 20 an excerpt from Malee's POR2 *Supplemental Section D Response* (February 17, 1998) at 17-18 describing the basis of the historical fruit cost allocation previously used.

[43] *See id.* at 10 and 11.

[44] *See id.* at 12.

Malee responds that the petitioners do not properly recognize the nature of the expenses excluded from its G&A allocation. Malee states that it is correct in excluding expenses that were either (1) unrelated to the company's general production or operation of the company or (2) direct expenses related to non-subject merchandise. Further, Malee argues that the Department has discretion to define the types of general expenses that can be used to calculate COP and that this decisional power was upheld by the Court of Appeals of the Federal Circuit in *SKF USA Inc. v. United States*.[45] Therefore, the Department has established the practice of excluding expenses which are deemed inapplicable to a company's general operations.

According to Malee, the petitioners presented misleading and incomplete descriptions of the expenses which they contend Malee should have included in its G&A calculation. Some of these expenses are provisional and precautionary and related to an unresolved legal dispute which involves potential losses related to loan guarantees. Since loan guarantees are similar to investments, unexpected losses from loan guarantees are like investment losses and so, Malee argues, should be excluded from its G&A. Malee argues that other expenses, for which it provided support in its supplemental response,[46] are wholly unrelated to the company's general operation or to CPF and, therefore, should be considered direct selling expenses for non-subject merchandise. Malee contends that all direct selling expenses should be excluded from its G&A expenses for purposes of calculating a margin. Malee asserts that by deducting expenses that are either direct or unrelated to its general operations, it has correctly calculated G&A expenses that correspond to its general operating expenses.

Department Position:

We agree with the petitioners that the Department should include expenses related to general operations, based on the Department's established practice. *See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire from Taiwan*, 64 FR 17336, 17337-17338 (April 9, 1999) and *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Japan*, 64 FR 30574, 30589-30590 (June 8, 1999) where we discuss the nature of expenses included in, or excluded from, G&A. In determining whether it is appropriate to include or exclude particular items from G&A, the Department reviews the nature of the item and its relation to the general operations of the company. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Taiwan*, 65 FR 34658 (May 31, 2000) and the accompanying Issues and Decision Memorandum at Comment 11.

Using this practice as a guide, we have reviewed the nature of the expenses in question in Malee's supplemental response.[47] Based on our review, we determined that the expense involving the provision for ongoing litigation fits the category of expenses related to the general

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[45] *See Malee's Rebuttal Brief* at 15 citing, *SKF USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001).

[46] *See id.* at 17.

[47] *See* SQR (February 13, 2002) at Volume II, 67-68, and Exhibit 51.

operations of the company.[48] The fact that it is a provisional and precautionary expense incurred in support of a subsidiary does not separate it from the general operations of the company. It is, in fact, exactly the sort of expense which we intend to capture in G&A, in which we include those expenses that apply generally to all of the company's operations. We disagree with Malee that its provision for legal fees is analogous to the expenses resulting from investment loss that Malee references in the *Final Results of Redetermination Pursuant to Court Remand, SKF USA Inc. v. United States*, Consol. Ct.No. 97-01-00054-S, Slip op. 01-86 (July 16, 2001), signed October 9, 2001.[49] In that remand determination, the Department clearly distinguishes investment losses from expenses related to general operations. Malee's provisions for legal fees, even if they are connected to litigation involving loan guarantees, do not fit into the financial expense category and therefore must be included with G&A.

Regarding the other set of expenses discussed by the petitioners and Malee in their respective briefs, we agree with Malee that these expenses should be excluded from G&A because they represent direct selling expenses or production costs. Because these expenses relate directly to the production or sale of specific merchandise, it is our normal practice to remove them from the SG&A when we create G&A. If the expenses relate directly to subject merchandise, they are considered in our sales adjustments, but not in our G&A for purpose of cost.

We have recalculated Malee's G&A to include those expenses which were incorrectly deducted in Malee's response. *See* Calculation Memorandum for further discussion which could not be publicly summarized.

III. ISSUES SPECIFIC TO TIPCO

Comment 8:Calculation of G&A Expenses

The petitioners argue that TIPCO's subtraction of rental income from total SG&A expenses in order to calculate G&A expenses should be disallowed because it is not part of the general operations of the company.[50] Sales of by-products and co-products of subject merchandise can be used to offset the total cost of manufacture according to the petitioners, however the leasing of property is not related to the production of CPF. The fact that the company renting the land also buys single strength juice through a pipeline from TIPCO is irrelevant; the rental income should not be allowed as a G&A offset, according to the petitioners.[51]

Department Position:

We disagree with the petitioners regarding TIPCO's inclusion of the rental income in its G&A

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[48] *See id.* at 67.

[49] *See Malee's Rebuttal Brief* at 15-16.

[50] *See* the Petitioners' September 6, 2002, Case Brief for Thai Pineapple Public Company, Ltd. (*Petitioners' TIPCO Case Brief).*

[51] *See id.* at 7.

calculation. Consistent with past reviews, we consider the rental of manufacturing space in the factory to be of a general nature, arising from the company's operations (*i.e.*, the rental of manufacturing space does not constitute a separate line of business). The conclusion that this income derives from normal operations of the company is reinforced by the fact that the related company rents the manufacturing space near TIPCO's pineapple processing facility in order to facilitate the transfer of pineapple juice. Therefore, we have continued to allow this rental income as an offset to G&A. *See, e.g., Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 63 FR 32,833, 32,838 (June 16, 1998) where we state that "{t}he Department permits offsets to G&A expenses for income earned from the company's production operations." In addition, we note that the income is less than 2 percent of the overall G&A expenses**.**

Comment 9:Income Offsets

The petitioners argue that the offsets TIPCO claimed to its reported costs should not be granted. These offsets were for income TIPCO received from specific services to another company.[52] The petitioners state that this income is not related to the production of subject merchandise or even TIPCO's general business operations. Therefore, according to the petitioners, this income is not eligible for offset treatment.

Department Position:

We disagree with the petitioners. TIPCO reported offsets to its reported costs for income derived from services provided to an affiliate. In the past we found that service income is part of the general operations of the company; the types of services TIPCO provides at the factory are related to its management of the factory and the costs of production. These services were not deducted from TIPCO's overhead and, consistent with prior reviews, we are allowing this offset. *See Notice of Final Results of Antidumping Duty Administrative Review and Recession of Administrative Review in Part: Canned Pineapple Fruit From Thailand*, 63 FR 52744 (October 17, 2001) and accompanying Decision Memorandum at comment 17.

Comment 10: Packing Overhead

The petitioners argue that TIPCO severely under-allocated its overhead expenses for labeling and packing CPF and therefore must recalculate its packing overhead expenses. They contend that the packing and labeling would account for a large portion or even the majority of total expenses incurred by the warehousing department. Further, the petitioners claim that TIPCO's current methodology subjectively allows TIPCO to choose which warehousing expenses are allocated to packing.[53]

Department Position:

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[52] Details not subject to public summary. *See* Analysis Memorandum for Thai Pineapple Public Company, Ltd. (December 5, 2002)

[53] *See Petitioners' TIPCO Case Brief* at 10.

We disagree with the petitioners. TIPCO's reported overhead expenses for packing and labeling are consistent with prior reviews. The petitioners offer no evidence beyond speculation that expenses were understated and that TIPCO's methodology was flawed. Speculation dose not constitute substantial evidence. *See, e.g., Asociacion Colombiana Exportadores de Flores v. United States*, 40 F. Supp. 2d 466, 472 (CIT 1999). Therefore, based on the evidence on the record and consistent with prior reviews, we have accepted TIPCO's overhead expenses for packing and labeling.

IV. JOINT ISSUE: DOLE, MALEE, & TIPCO:

Comment 11: Fruit Cost Allocation

The petitioners contend that the Department should require respondents to allocate pineapple fruit costs between specific solid products such as CPF slices, chunks and crushed based on the same NRV methodology it requires for the allocation of fruit costs between solid and juice products (as groups of products). They assert that it is wrong that Dole, Tipco and Malee all have applied a two-tiered allocation system wherein each respondent allocates fruit costs between its juice and solid products on an NRV basis, but allocates fruit costs between specific product types based on relative weights. The petitioners address this point separately for each of the three companies. As explained below, Dole agrees with the petitioners that the two-tiered treatment represents a contradiction, but argues that the NRV-based allocation should be applied among Dole's solid products only under specific conditions. Malee disagrees with the petitioners and argues that the NRV allocation methodology should only apply for allocation of fruit costs between joint products (juice and solid) and not among different solid products. As stated above, TIPCO also submitted a rebuttal brief, but it was rejected by the Department as an untimely submission.

Dole

The petitioners argue that Dole should allocate its fruit costs among different CPF forms such as slices, chunks, and crushed, based on NRV ratios. They state that Dole failed to do this, and instead used standard case conversion factors to allocate fruit costs on a weight basis. The petitioners contend that this contradicts the Department's requirement that respondents base their fruit cost allocations on relative value.[54] The petitioners argue that a slice of pineapple with good, consistent color and texture is obviously worth more than a comparable quantity of crushed pineapple. They assert that the Department should account for this difference basing the allocation of fruit input costs among solid products on the relative value of the finished products. They claim that if the sliced pineapple is worth more, it should cost more (to produce) using an NRV cost allocation. Finally, the petitioners suggest that record data provide enough information for the Department to develop a ratio of the relative costs and apply it to Dole Thailand's total solid fruit costs. The petitioners ask that the Department adjust Dole Thailand's direct material

[54] *See Petitioners' Dole Case Brief* at 10 citing *1997 Preliminary Results*.

costs in this manner.[55]

Dole states that the petitioners' arguments point out the contradictions in the Department's policy requiring costs to be allocated between solid and juice products, but not among high and low value solid products only. Doles agrees with the petitioners' arguments that a net realizable value approach can be applied to the allocation of fruit costs among solid products and states that this is the reason why it reported its fruit costs in the instant review on a product-specific basis, in accordance with its normal cost accounting methods. Dole contends that the Department should use the fruit-cost allocation ratios that Dole Thailand uses in its normal cost accounting records, but should not extend this method to all of its solid products. Dole contends that there is no need to reallocate the costs for the solid products for which Dole does not use specific cost allocations in its records, because even the petitioners have stated on the record that most solid pineapple products, with the same can size, are sold at the same price regardless of cut or packaging.[56]

TIPCO

Similarly, the petitioners argue that TIPCO incorrectly allocated its fruit costs to shift costs away from canned pineapple.[57] The petitioners state that TIPCO's use of a weight-based methodology to allocate costs across its production of CPF, canned tropical fruit salad (TFS), and aseptic crushed pineapple (AC) is flawed and will lead to a less accurate antidumping duty margin calculation.[58] The petitioners cite to intuitive reasons to support their argument. They state that CPF, TFS, and AC are all of different qualities, with CPF being the highest quality and AC being the lowest. Therefore, the petitioners argue, it is incorrect to believe that the production costs of CPF and AC, by weight, would be similar because fruit costs per kilogram of CPF are naturally higher than those required to produce AC.

The petitioners offer two possible solutions in order to change how TIPCO allocates its fruit costs among solid pineapple products. First, the petitioners state that the Department could allocate costs among solid products based on relative sales prices.[59] With this method, the Department could compare the unit prices of CPF to the unit prices of AC, for example, and allocate the costs accordingly. The petitioners argue that this method is superior to a weight-based method because it takes into account that higher costs are associated with producing higher-value products.[60]

The petitioners' second suggestion is that the Department allocate TIPCO's costs among solid

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[55] *See id.* at 9-11 (September 9, 2002).

[56] *See Dole Case Brief* at 16-19 (September 16, 2002).

[57] *See* the Petitioners' September 9, 2002, case brief on TIPCO (*Petitioners' TIPCO Brief*) at 2-7.

[58] *See id.* at 2.

[59] *See id.* at 3.

[60] *See id.*

products using the historical NRV ratio provided by TIPCO in the section D questionnaire response.[61] Specifically, the petitioners state that the Department should use TIPCO's allocation of costs between solid and juice products, and then use the same NRV ratio on a per-unit basis to distribute costs of solid products between subject and non-subject merchandise. This method, the petitioners argue, would take into account any differing production costs between high-quality CPF and lower-quality, non-subject merchandise.[62]

The petitioners argue that the Department must not use any weight-based system of allocating fruit costs citing the *1997 Preliminary Results*, the *Final Determination*, and the *2001 Preliminary Results*.[63] The petitioners also argue that the Department's decision not to allow allocation of costs based on weight was upheld in *Thai Pineapple Canning Co. v. United States*, 187 F. 3d 1362 (Fed. Cir. 1999).[64]

Finally, the petitioners argue that the Department's reasoning cited in rejecting a weight-based system of allocating costs to juice versus solid products is relevant to the allocation of costs among different types of solid products.[65] The petitioners stress that different parts of the pineapple are used to make different types of solid fruit products, just as different parts of the pineapple are used for solid and juice products. Specifically, the petitioners state that the solid pieces of pineapple fruit used to produce AC are not interchangeable with those needed to produce high-quality CPF.[66]

TIPCO rebuttal brief was returned as untimely filed; therefore, TIPCO has no rebuttal to the petitioners' arguments.

Malee

The petitioners argue that the Department should allocate Malee's fruit costs among different pineapple products based on their relative value.[67] They contend that the current weight-based methodology using case conversion factors is flawed and therefore it incorrectly allocates the costs of fruit. The petitioners further state that the Department has told respondents that such weight-based methods of allocating costs are incorrect and should, therefore, direct Malee to adjust its costs in order to correct this flawed methodology.[68]

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[61] *See id.*

[62] *See id.* at 4.

[63] *See id.* at 5.

[64] *See id.*

[65] *See id.* at 6.

[66] *See id.*

[67] *See Petitioners' Malee Brief* at 6-10.

[68] *See id.* at 6 and 7.

Similar to the arguments submitted on TIPCO's cost allocation methodology, the petitioners state that Malee has correctly allocated its fruit costs to juice and to solid products by using the NRV ratio, but that Malee should then allocate the solid fruit costs among the different forms of solid products based on those products' relative values.[69] The petitioners cite the same or similar Department documents as those referenced in their TIPCO arguments, summarized above, in support of their contention that the Department clearly objects to a cost allocation based upon weight.

The petitioners state that the relative values of different types of CPF are well known to the Department and that customers are willing to pay different amounts for different forms of CPF.[70] The petitioners argue that if sliced pineapple is worth more, then it costs more and cite to *Final Determination*.[71]

The petitioners also state that Malee has provided unit costs and unit prices, so the Department should develop a ratio of the relative costs and apply that ratio to Malee's total solid fruit costs to establish more accurate costs. Last, the petitioners state that the standard case conversion factors are quantitative factors, and should not be used by the Department. They state that the differences in costs that exist between solid and juice also exist between slices versus crushed. Therefore, the petitioners argue, allocating costs evenly among solid products is not consistent with Department statements regarding fruit-cost allocation in previous reviews, and, accordingly, the Department should adjust Malee's direct material costs by using a unit cost versus unit price based system.[72]

Malee, in its rebuttal brief, states that the petitioners' arguments misinterpret the Department's reasoning for using the NRV cost allocation methodology and contradict the petitioners' own support for a historic NRV methodology.[73] First, Malee explains that the purpose of the NRV methodology is to allocate joint production costs only among different co-products when such products have different characteristics resulting from characteristics inherent in different parts of the raw material.[74] Malee states that the Department, in the investigation of CPF, made the distinction that the NRV methodology was meant for solid and juice products, not for different types of solid products.[75]

Malee further explains that a pineapple is not homogenous, but is made up of only two types of

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[69] *See id.* at 7.

[70] *See id.* at 8-9.

[71] *See id.* at 9.

[72] *See id.* at 10.

[73] *See Malee's Rebuttal Brief* at 12.

[74] *Id.*

[75] *See id.* at 13. Malee cites *Final Determination*. Malee also cites, as support, *Lumber Decision Memorandum* at Comment 4.

raw material: the core and the skin, used for juice production, and the cored cylinder, used almost always for solid products. Malee argues that there is no inherent difference between pineapple parts used for slices, pieces, or tidbits.[76]

The respondent also states that costs associated with juice and solid products can be tracked as soon as the pineapple is cut, leaving the skin and the core, on one side, and the fruit cylinder on the other. Here, Malee states, the inherent difference is between pineapple parts that can be used for solid products and the parts that can be used for juice.[77] Malee asserts, however, that there is no pre-existing difference between the pineapple parts used for slices, pieces, tidbits, and other CPF cuts, much less a difference so significant that the end uses differ considerably.[78] Therefore, Malee argues, the Department uses the NRV methodology to assign costs from the raw material, but after such material can be tracked between solid and juice products, no NRV methodology is needed.[79] Last, Malee accuses the petitioners of requesting that the Department use a fruit-cost allocation methodology that the petitioners themselves have commended the Department for disallowing.[80]

Department Position:

We disagree with the petitioners' argument that NRV should be applied to solid CPF products and with Dole's argument that NRV should partially be used in assigning solid costs. When multiple products are processed simultaneously from the same raw material, here pineapple fruit, a way of allocating joint costs must be developed. The NRV methodology is used to allocate the joint production costs between juice and solid products. We determined in our original investigation of CPF that it would be unreasonable to value the different parts of a pineapple (shell, core, cylinder, etc.) equally using a weight based methodology because the different parts cannot be used interchangeably when it comes to juice versus solid products. *See Final Determination.*

With respect to the solid product alone, however, the product derives from only one part of the pineapple, the cylinder. The facts of this case support the conclusion that various cylinder grades do not constitute different recognizable cost elements. Unlike lumber, where different wood grades within a log occur in fairly known quantities and can be disassembled,[81] the quality of a cylinder is not known until after the split-off point. In a given lot of fresh pineapple, the CPF producer is not paying more for "fancy" grade pineapples than for "standard" grade ones and the amount of each grade within a given batch of solid fruit is unknown at the time of purchase, and

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[76] *See Malee Rebuttal Brief* at 13.

[77] *See id.* at 13.

[78] *See id*.

[79] *See id.* at 14.

[80] *See id.* at 14-15

[81] *See Lumber Decision Memorandum* at Comment 4.

therefore do not affect the cost of the pineapple. Further, while the pineapples themselves are not homogeneous, the cylinders which go into solid production are. Cylinders can be used interchangeably to make any pineapple product be it aseptic crush, sliced CPF, crushed CPF, tidbits for TFS or any other solid pineapple product. So, while the grade of a pineapple might make it more likely to be used for a particular form of CPF, grade does not prevent a cylinder from being used for any form of solid pineapple.

The Department's practice is to use NRV methodology only when raw materials parts are not homogeneous, rendering them non-interchangeable, as is the case with the pineapple parts used for juice versus solid products. *See Final Determination; also Lumber Decision Memorandum* at Comment 4 where the Department discusses the application of NRV methodology. It is inappropriate to apply NRV methodology to allocate fruit costs among different solid pineapple products where the material in question, pineapple cylinders, are uniform in structure and make-up.

Additionally, we disagree with the petitioners' argument that TIPCO incorrectly allocated its fruit costs to shift cost away from canned pineapple fruit and that fruit cost for CPF would "naturally" be higher than for AC.[82] In their argument, the petitioners state that CPF is for human consumption, seeming to imply that AC is not for human consumption and, therefore, that the fruit, labor, and overhead costs associated with CPF would be greater than that of AC.[83] There is no evidence on the record to suggest that AC is not for human consumption or that the crushed pineapple used for AC is in any way different from the crushed CPF. Further, as stated above, we do not believe that the facts of this case support the conclusion that various cylinder grades constitute different recognizable cost elements, and given the lack of record evidence, we find the petitioners' arguments to be largely speculative.

We also disagree with the petitioners' suggestion that Malee's standard cost system, which recognizes cost distinctions among different CPF products, provides a reasonable alternative basis for the Department to allocate costs among solid products and, in effect, supports the petitioners' contention that the fruit-cost allocation among solid products should be value-based.[84] As Malee has indicated, the petitioners are in effect endorsing a "fruit-cost allocation scheme" which they state, in the same brief, the Department was wise to reject.[85] As we discussed in Comment 6 above, we recognize that Malee incorporated NRV into its new fruit-cost allocation methodology. However, for reasons also discussed in Comment 6, we did not use Malee's new cost allocation methodology in our antidumping analysis.

V. ISSUE SPECIFIC TO TPC

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[82] *See Petitioners' TIPCO Case Brief* at 2-7.

[83] *See id*. at 3.

[84] *See Petitioners' Malee Case Brief* at 9-10.

[85] *See Malee's Rebuttal Brief* at 14 and *Petitioners' Malee Case Brief* at 3.

Comment 12: Affiliation of Thai Pineapple Industry Corp., Ltd. (TPC), Mitsubishi Corporation (MC), Princes Foods, B.V. (Princes), Mitsubishi International Corp. (MIC), and Chicken of the Sea (COSI)

TPC argues that the Department should base its antidumping duty calculation on TPC's sales to MIC and Princes because TPC is not affiliated with MIC and Princes.[86] First, TPC states that it is not affiliated with MIC and Princes because MC's role in TPC changed significantly in March 2000. MC's share in TPC was reduced to a level lower than 15 percent, a level under Japanese tax law that does not constitute affiliation.[87] TPC also states that no MC employees nor board members serve as officers of TPC. Another significant point made by TPC is almost entirely business proprietary and is, therefore, discussed further in the analysis memorandum.[88]

TPC alleges that the Department's reasoning in its *Affiliation Memorandum*[89] is flawed and that case precedent necessitates a finding that TPC, MIC, and Princes are not affiliated.[90] First, TPC claims that it does not exercise indirect control over MIC and Princes. As support, TPC states that MC can theoretically control TPC because MC owns some of TPC's shares, but TPC cannot control MC. TPC asserts that even though MC is affiliated with MIC and Princes, TPC cannot control MIC and Princes because TPC does not control MC.[91] The company states that the Department has provided no evidence that the relationship between TPC and MIC and Princes has the potential to affect production, pricing, or cost decisions of the subject merchandise or foreign like product. TPC concludes that TPC and MIC/Princes conduct business with each other on an arm's-length basis just like any supplier and customer.[92]

TPC also alleges that the Department's reasoning in its *Affiliation Memorandum* is flawed because there is no common control among TPC, MC, MIC, and Princes.[93] TPC cites *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 65 FR 5554, 5556 (February 4, 2000) (*Brazilian Steel*) as Department precedent in finding no common control between entities. TPC argues that the fact pattern in *Brazilian Steel* is substantially similar to the fact pattern of the instant review in that both cases involve one entity that has ties to two other

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[86] *See* TPC's September 6, 2002, case brief (*TPC Case Brief*) at 1.

[87] *See id.* at 3.

[88] *See id.* at 3 and 4. *See also* Analysis Memorandum for Thai Pineapple Canning Industry Corp., Ltd. (December 5, 2002).

[89] Memorandum to Bernard Carreau from Martin Claessens, Affiliation of Thai Pineapple Industry Corp., Ltd. (TPC), Mitsubishi Corporation (MC), Princes Foods, B.V. (Princes), Mitsubishi International Corp. (MIC), and Chicken of the Sea (COSI) (February 6, 2002) (*Affiliation Memorandum*).

[90] *See TPC Case Brief* at 4.

[91] *See id.* at 6.

[92] *See id.*

[93] *See id.* at 7.

entities in the form of members on the boards of directors and shared ownership. In *Brazilian Steel*, CVRD owned shares in CSN and USIMINAS/COSIPA and appointed two members to the board of directors of USIMINAS/COSIPA. Also, CVRD's CEO sat on the board of directors of CSN. Because the Department found that no common control existed between CVRD, CSN, and USIMINAS/COSIPA in *Brazilian Steel*, TPC argues that the Department should find no common control in the current administrative review between MC, TPC, and MIC/Princes/COSI.[94] According to TPC, when compared to the facts in *Brazilian Steel*, the current review's fact pattern makes an even stronger case for finding no common control because MC's CEO does not sit on TPC's board of directors, and MC owns a smaller percentage of TPC than CVRD owned of CSN.[95]

In concluding its argument that the *Affiliation Memorandum's* reasoning is flawed, TPC contends that there is no close supplier relationship between TPC and MIC and Princes.[96] TPC further states that it sold substantial quantities of subject merchandise to U.S. customers other than MIC and that MIC purchased substantial quantities of such merchandise from suppliers other than TPC.[97] Concerning Princes, TPC argues that, in the same way, TPC and Princes both interact with other customers and suppliers, respectively. TPC cites the Statement of Administrative Action (SAA) and various other cases[98] in discussing the Department's definitions of a close supplier relationship. Such cites, argues TPC, define such a relationship as one in which the companies become reliant on each other. TPC concludes that because it does not rely on MIC nor Princes, and that because MIC and Princes do not rely on TPC, no such close supplier relationship exists.[99] TPC concludes by stating that the Department already has the data it needs to make the decision that TPC is not affiliated with MIC, Princes, and COSI and should, therefore, calculate an antidumping duty margin in this administrative review accordingly.[100]

The petitioners argue that the Department correctly found that TPC is affiliated with MC, MIC, and Princes.[101] The petitioners state that TPC has not submitted any evidence in the current review that should cause the Department to change its original finding and that TPC's arguments

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[94] *See id.* at 7-9.

[95] *See id.* at 9.

[96] *See id.*

[97] *See id.* at 10.

[98] SAA accompanying the URAA, H.R. Doc. No. 103-316, vol. 1 at 838 (1994); *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 FR 18,404, 18,417 (April 15, 1997); and *Notice of Final Determination of Sales at Less Than Fair Value: Certain Folding Gift Boxes from the People's Republic of China,* 66 FR 58,115 (November 20, 2001).

[99] *See TPC Case Brief* at 11.

[100] *See id.*

[101] *See* the Petitioners' September 17, 2002, rebuttal brief on TPC (*Petitioners' TPC Rebuttal)* at 1.

are flawed because TPC does not analyze all indicia of affiliation in their totality.[102]

The petitioners state that the Department already addressed some of TPC's arguments in the Department's *Affiliation Memorandum*. They state that the Department recognized the change in holdings of MC in TPC and the change in the ownership arrangement in its decision to find affiliation in this case and already rejected TPC's arguments.[103] The petitioners add that TPC's argument concerning affiliation under Japanese tax law, is irrelevant because the Department is bound by the U.S. antidumping laws, not by the laws of Japan.[104]

The petitioners further assert that TPC's claim that the Department erroneously concluded that TPC has indirect control over MIC and Princes is wrong because TPC focuses on narrow indicia of control. Rebutting TPC's statement that it is a small company with a fraction of the assets and revenues of MIC and Princes,[105] the petitioners contend that relative size of an entity (TPC) is not a factor in the Department's decision-making process.

The petitioners further claim that TPC wrongly shifted the burden of persuasion from itself to the Department by stating that the Department has provided no evidence that the relationship between TPC and MIC and Princes has the potential to affect decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.[106] Furthermore, the petitioners cite to the Department's *Affiliation Memorandum* stating that TPC apparently ignored pages 3 through 5, where the Department relies upon the long-standing customer-supplier relationship between TPC, MC, MIC, and Princes, in making its affiliation decision.[107]

The petitioners continue their rebuttal by stating that TPC did not identify any similarities between *Brazilian Steel* and the current review with respect to other indicia of control such as tight chain of control, long-standing customer-supplier relationships, and sales agreements.[108] Further, the petitioners cite the SAA at 838 to demonstrate that close customer-supplier relationships are sufficient evidence for the Department to find affiliation through control.[109]

Lastly, the petitioners state that TPC's statement that it and MIC do not have an exclusive customer-supplier relationship has not changed the Department's views in past reviews. Also, the petitioners state that TPC does not argue or present evidence demonstrating that the existence

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[102] *See id.*

[103] *See id.* at 1 and 2.

[104] *See id.* at 2.

[105] *See id.*

[106] *See id.*

[107] *See id.* at 2 and 3.

[108] *See id.* at 3.

[109] *See id.*

of sales to unaffiliated parties demonstrates that the entities under examination in this case do not have a close customer-supplier relationship.[110]

Department Position:

We agree with the petitioners. Section 771(33)(F) of the Act provides that affiliated parties are "{t}wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person." In this case, we find that TPC, MIC and Princes are under the common control of MC, and therefore affiliated, under section 771(33)(F) of the Act.

As stated by TPC in its case brief,[111] MIC is owned by MC. Princes is wholly owned by Princes Ltd., which is wholly owned by MC. TPC concedes that MC controls MIC and Princes under section 771(33)(E) of the Act.[112]

With respect to TPC, the Department also finds that TPC is under the control of MC. Even though MC's equity ownership in TPC was lower than in previous reviews, its equity position was significant during the POR. MC, via its role as a substantial buyer (through its wholly owned subsidiaries MIC and Princes), had the potential to control TPC and to impact the price, production, and other decisions impacting the subject merchandise. TPC is dependent upon MC's business. *See* the Department's *Analysis Memorandum*, which contains a detailed discussion of relevant proprietary data that cannot be included in this public document.[113]

TPC cites *Brazilian Steel* as support for its position that MC does not control TPC. We do not believe that the facts of that case are similar to the facts in the current review. When determining whether or not parties are affiliated, the Department analyses the total circumstances, not just the equity ownership. One way to find affiliation under section 771(33)(F) is to find that two or more parties are under the common control of another party. In *Brazilian Steel*, the Department found that CVRD did not control USIMINAS and, therefore, it could not exercise common control over both CSN and USIMINAS within the meaning of subsection (F).

In this case, there is no question that MC controls MIC and Princes, and, therefore, in addition to MC equity ownership of TPC, MC can control the business relationship between MIC/Princes and TPC. TPC has been doing a substantial amount of business with MIC/Princes for forty years.

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[110] *See id.* at 4.

[111] *See TPC Case Brief* at 2.

[112] *See id.*

[113] *See* Analysis Memorandum for Thai Pineapple Canning Industry Corp., Ltd. (December 5, 2002).

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results in the Federal Register.

AGREE____ DISAGREE____

_____
Faryar Shirzad
Assistant Secretary
for Import Administration

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Date